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NO. 1058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

GEORGE SCHUMANN, ET UX, ET AL.,

Respondents.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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NO. 1056

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OPINIONS BELOW

The opinion of the District Court of Appeal upon Petitioner's interlocutory appeal (Appendix B of the Petition) is reported at 167 So.2d 95. The final order and opinion of the trial court (R 79, and Appendix B of the Petition) is unreported. The opinion of the District Court of Appeal

on Final Judgment (Appendix B of the Petition) is reported at 199 So.2d 727. The refusal of the Supreme Court of Florida to grant certiorari (Appendix B of the Petition) is unreported.

JURISDICTION

The jurisdictional requisite is adequately set forth in the petition.

QUESTIONS PRESENTED

Inasmuch as the first two questions presented, urged by the petitioner, are based upon inadequate or erroneous factual hypotheses, Respondents state the questions presented to be more properly as follows:

I

Is recovery of just compensation by a property owner from an airport owner and operator for a constitutional taking arising out of low flights of jet aircraft, and their attendant noise, vibrations, smoke and the like, which has substantially impaired the use and enjoyment of such owner's property and substantially reduced its value, precluded by the Federal Aviation Act of 1958 creating a public right of freedom of transit through the navigable air space?

II

Does the recovery against an airport owner and operator by a landowner whose property has been taken in the constitutional sense, create an unreasonable burden on interstate and foreign commerce?

The petition nowhere substantiates any of the premises

set forth as the basis for the third question presented by the petitioner. This litigation involves eminent domain and does not sound in tort. In any event, the question is so insubstantial as not to merit comment.

STATEMENT OF THE CASE

This is an "inverse condemnation" action brought by some thirty property owners (mostly husbands and wives) against the City of Jacksonville, a municipal corporation, as the owner and operator of the Jacksonville Municipal Airport. Respondents seek compensation under Sections 4 and 12 of the Declaration of Rights of the Florida Constitution and under Article XVI, Section 29, of the Florida Constitution, and under Amendment XIV of the United States Constitution, for a taking of their property for public use resulting from low flights of jet aircraft in landing upon and taking off from the Northeast-Southwest (instrument) runway of the airport. Respondents' homes lie within an area one-half mile on each side of the Northeast-Southwest runway, including a distance of 3,000 feet from its northeast end, as determined by the trial court (R 90) (Appendix B of Petition, page 47).

In May 1962, at petitioner's request and with its consent and approval, the Northeast-Southwest runway was extended some fifteen hundred feet in a northeasterly direction toward the respondents' homes (R 173). The extended runway became operational on December 11, 1962. Most commercial jet aircraft and jet fighter planes of the Florida Air National Guard, which leases a part of the airport property from the petitioner, make extensive use of the Northeast-Southwest runway.

Upon the filing of the complaint, Petitioner moved to

dismiss on the ground that the complaint failed to state a cause of action. The trial court denied the motion and petitioner took an interlocutory appeal, urging upon the District Court of Appeal that there had not been a "taking" of the respondents' properties within the meaning of the Constitution of Florida or within the meaning of the Constitution of the United States, inasmuch as there could not possibly be overflights in respect to all of the respondents' properties and that the noise, vibrations, concussions, fumes and the like did not constitute a physical invasion amounting to a complete ouster of the landowners. The District Court of Appeal affirmed the trial court at 167 So.2d 95 (Appendix B of the Petition) relying upon *United States v. Causby*, 328 U.S. 256 (1946), *Griggs v. County of Allegheny*, 369 U. S. 84 (1962), *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962) and *Martin v. Port of Seattle*, 64 Wash.2d 390, 391 P.2d 540 (1964). In the latter two cases, the Supreme Courts of Oregon and Washington held that noise, if frequently enough inflicted, can amount to a nuisance and that a noise-nuisance can amount to a taking, in a constitutional sense, regardless of the direction from which it comes.

Petitioner sought certiorari in the Supreme Court of Florida of the decision of the District Court of Appeal. Certiorari was denied. Thereupon, the cause was remanded to the trial court for trial on the merits.

The trial court found as follows:

> "The evidence shows that the noise from the nearby jets occurs at, upon and from the extended runway at frequent intervals and at all times of the day or night; that the noise halts personal and 'phone conversation; radio and television reception is disrupted, and the sound obliterated; sleep is disturbed, and the noise is painful to many; the noise also causes fear,

particularly in small children; that, in addition to the high pitched whine of the jets on landing, there is a roar on takeoff and frequently a sharp concussion or explosion which occurs when the fighter jets' after-burner is used. That unburned jet fuel leaves a greasy film on cars, swimming pools, clothes, laundry, homes and furnishings; that windows facing the airport must be kept closed winter and summer because of the frequency of the flights; and that a kerosene odor is prevalent. That the jets cause vibrations in the houses and of their contents, causing windows and dishes to rattle, putty in window frames to loosen, pictures to hang askew, shingles on the houses to loosen, and, in some instances, structural damage to the homes in the area. Plaintiffs also complaint that when the commercial jets taxi and turn for takeoffs and when the Air National Guard planes go through warmup procedures, dust, small rocks and other debris are blasted directly against their properties.****

"The accumulated effect of the foregoing elements, occurring with such frequency has, in the opinion of a qualified real estate appraiser, lessened the fair market value of each of the plaintiffs' properties, ... "

During the course of the litigation, the petitioner was granted leave to file a supplemental answer (R 45-47 and R 50) stating that pursuant to a Special Bond Election, it had embarked upon the construction and eventual operation of a new municipal airport which it planned to open for filght operations in the year 1968, whereupon the existing airport would cease operating. At the conclusion of the trial, the court having found that a "taking" of an easement in the properties of the respondents had occurred, directed the petitioner to institute eminent domain proceedings within

sixty (60) days from the date of the order to condemn a temporary easement for the period commencing December 11, 1962, and ending December 11, 1968, in respect to the properties of the respondents which are within one-half mile of each side of the Northeast-Southwest runway, including a distance of 3,000 feet from its northeast end, for the purpose of permitting any plane to make noises, emit gases, fumes and smoke, to cause vibration and concussion, and to disturb or blast dust and small particles of matter against and onto respondents' said properties.

The trial court's decision was affirmed by a unanimous court, *City of Jacksonville v. Schumann*, Florida Appellate 1967, 199 So.2d 727, (Appendix B of Petition, page 49). The Supreme Court of Florida denied certiorari (Appendix B of Petition, pages 56-57).

ARGUMENT

I

STATE COURT FINDINGS OF FACTS ARE NOT REVIEWABLE.

The Florida Courts in this case held that there had been a constitutional taking of respondents' properties by the City of Jacksonville. Implicit in the petition is the fact that petitioner accepts the rulings of *Griggs* (supra). That case holds that the enactment of the Federal Aviation Act of 1958 did not, and does not, totally preclude noise damage claims by landowners.

Specifically, petitioner asks whether the Congress intended, by the enactment of the Federal Aviation Act of 1958,

to preclude noise claims arising out of flights over 500 feet. The record is clear that the properties in question are all subject to regular and frequent flights below 500 feet. (R 235, 247, 254, 505, 506, 519) Secondly, petitioner asks whether Congress intended to preclude noise damage from flights not directly over the respondents' properties. It fails to make clear that all such properties lie within an area much smaller than that recommended by the Federal Aviation Agency for non-residential development. The interference with the use of respondents' land is of the same directness and magnitude as though overflights existed. The Florida Courts held that the absence of a technical trespass did not preclude these respondents from recovering within the meaning of Article XVI, Section 29, of the Florida Constitution, which provides for just compensation for a "taking" of private property for public use.

The construction and application of a State Constitution by the highest court of that State is conclusive. *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937); *Manley v. Park*, 187 U.S. 547 (1903).

Petitioner contends that the construction of the Florida Constitution by the Florida courts imposes an unreasonable burden upon commerce (Petition, page 3). The only possible effect, however, is the obligation of paying just compensation which only arises when and if the airport owner and operator fails to acquire adequate property interests for the airport approach areas. This event constitutes, at most, an incidental, non-discriminatory, non-recurring economic impact upon commerce which in no way obstructs the movement, or the Federal regulation, of air traffic. In another field, it has been consistently held that a state may constitutionally levy general taxes upon property of those engaged

in interstate commerce, even though the economic effect of such levy is direct, inevitable and recurring. *St. Louis and S. W. R. Co. v. Nattin*, 277 U.S. 157 (1928); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897).

Petitioner's third attempt to secure a review is premised upon an alleged deficiency in the determination by the trial court that the fair market value of respondents' properties had been lessened rather than destroyed, and that none of respondents had "moved from their property as a result of the airport". (Petition, page 13) Petitioner fails to mention that the trial court, in its order, determined that, in a subsequent eminent domain proceeding, respondents will be compensated for such taking only if they suffer "substantial" damage as distinguished from "consequential" or "incidental" damage (Appendix B of Petition, page 46). Furthermore, actual abandonment of property is not a prerequisite to a constitutional taking. See *Causby*, in which the aircraft flights which disrupted Mr. Causby's chicken business did not force him to move away. This Court held that uninhabitability was not required for a constitutional taking, it being sufficient that the utility of the land had been limited and its value diminished.

II

THERE ARE NO NEW OR IMPORTANT QUESTIONS OF FEDERAL LAW.

Petitioner's adherence to *Griggs* is, in effect, an admission that noise claims are not barred by the congressional enactment of the Federal Aviation Act of 1958. Assuming that the facts in this case extend to some degree beyond *Causby* and *Griggs*, petitioner manifestly has failed to demonstrate how such facts, as found by the Florida Courts to constitute a constitutional taking, conflict with congressional intent as

expressed in the Federal Aviation Act. The Florida decisions in this case fully accord with the right of freedom of transit and in no way impede Federal regulation of air commence. Demonstrably, the Federal Aviation Act of 1958 did not purport to abrogate state remedies in favor of landowners, as Section 1506 states:

> "Nothing contained in this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies.' 72 Stat. 798, 40 USC 1506.

In any event, as early as 1914, this Court held in *Richards v. Washington Terminal Co.*, 233 U.S. 546, (Appendix B of Petition, p. 39) that a property owner in the neighborhood of, but not abutting upon railroad tracks, was entitled to recover for the peculiar damages accruing to his property which resulted from the use of a fanning system operated by the Terminal Company which forced gases and smoke from a railroad tunnel so near his property as to render it less habitable than it would otherwise be. And in *Portsmouth Harbor Land and Hotel Co. v. United States,* 260 U.S. 327 (1922), this Court found no difficulty in holding that the installation of an artillery battery on an elevation, with a purpose and effect of subordinating the strip of land between the battery and the sea to the right of the government to fire projectiles, for the purpose of practice or otherwise, with the result of depriving the owner of the land of its profitable use, imposed a servitude upon such land constituting a taking of property for which compensation should be made. It is, thus, abundantly clear that the decisions of the Florida Courts in this litigation are completely consistent with Federal decisions on the subject of "taking" in a constitutional sense.

III

THE QUESTION PRESENTED IS NOT OF IMPORTANCE.

Petitioner says this case is "of extreme national importance" (Petition, page 10) but fails to document this claim, except to complain inferentially of its potential liability to the respondents. The Florida Courts refused to consider this case as involving a question of "great public interest". (Appendix B of Petition, p. 55)

The Federal Government has consistently followed a policy of acquiring, by purchase or condemnation, easements and other property interests in areas adjacent to military air fields. On the civilian side, a Federal Agency, namely, the Federal Aviation Agency, an expert in the field of air transportation, has, in its Aircraft Noise Abatement Planning Series, Item 3, September 2, 1960, (Respondents' Exhibit No. 7, R 183) (Appendix B of Petition, page 44), recommended that no suburban residential development, or place of public assembly, be permitted within an area at the end of airport runways which is three times as long as the area defined by the trial court as being eligible for compensation. Furthermore, as this Court has noted in *Griggs*, Congress has provided in 49 USC, Section 1112(a)(2), for payments to the owners (municipal or otherwise) of airports for the "costs of acquiring land or interests therein or easements through or other interests in air space."

Petitioner's warning that if ".... states were free to construe the 'taking' provisions of their constitutions...." (Petition, page 10), jet air travel would be destroyed or burdened with exorbitant landing fees to reimburse airport operators for the expense of acquiring easements for "incidental" injury is but a naked plea for an advisory opinion from

this Court. It amounts to an invitation for this Court to go beyond the record in this case. It ignores the fact that respondents' properties are within a strictly delimited area and that the trial court specifically determined that no respondent should recover for "incidental" damage or injury. To the extent that a Federal question is involved in this cause, the same is not one of great substance, and the decision of the Florida Courts accords with applicable decisions of this Court. There is no direct conflict with *Batten v. United States.* 306 F2d 580 (1962), Cert. den. 371 U.S. 955, or with *Avery v. United States,* 330 F.2d 640 (1964).

IV

THE DECISION BELOW IS CLEARLY CORRECT.

Both at the pleading stage and upon trial on the merits, petitioner sought review of all points which it deemed worthy of consideration by the highest court of this State, all to no avail. This case was determined in accordance with *Causby, Griggs, Ackerman v. Port of Seattle,* 55 Wn.(2d) 400, 348 P.2d 664 (1960), *Thornburg* and *Martin.*

The Supreme Courts of Oregon and Washington in *Thornburg* and *Martin,* respectively, both determined upon facts nearly identical to those in this case that an airport operator, situated as petitioner is here, had not by constitutional standards acquired sufficient and adequate property interests from adjacent owners. When review of the *Martin* case was sought in this Court, certiorari was denied, *Port of Seattle v. Glenn A Martin, et al.,* 379 U.S. 989 (January 25, 1965). The findings of the Florida courts in the decision below fall squarely within the principles enumerated in the cases above cited and the decision below correctly held that respondents are entitled to just compensation for the taking of their property.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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